Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

WEI YE, HAO WANG, DOES A, B, C, D, E, F,
and others similarly situated,

Petitioners,

v.

JIANG ZEMIN AND FALUN GONG CONTROL OFFICE,
a/k/a OFFICE 610,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a former head of state able to claim head-of-state immunity?

2. Does head-of-state immunity protect a former head of state for his or her private acts that are unofficial or for conduct that is *ultra vires*, beyond the lawful authority of the sovereign state and in violation of *jus cogens* standards of international law?

3. To what extent are U.S. courts obliged to accept suggestions of immunity provided by the Executive Branch that go beyond the factual question of whether or not a prospective defendant does or does not currently hold the position of head of a foreign state, or is otherwise immune from judicial process as an eligible diplomat?

LIST OF PARTIES

The parties below are listed in the caption. In addition, thirty-nine members of the United States Congress appeared as *amicus curiae* in support of petitioners. The United States Government appeared as *amicus curiae* in support of Respondent, Jiang Zemin.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Wei Ye v. Jiang Zemin,* 383 F.3d 620 (7th Cir. 2004). The Seventh Circuit affirmed the September 12, 2003 decision of the United States District Court for the Northern District of Illinois, reported at *Plaintiffs A,B,C,D,E,F v. Jiang Zemin*, 282 F. Supp. 2d 875 (N.D.Ill. 2003), as well as the October 6, 2003 decision of the same court on a motion for reconsideration of the same case, docketed on October 15, 2003. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under Title 28 United State Code § 1254(1). The time for filing the enclosed petition has been extended to and including February 5, 2005, by order of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code § 1350, Alien Tort Claim Act and the Torture Victims Protection Act; Title 28 United States Code, § 1602 *et seq*., Foreign Sovereign Immunities Act of 1976.

STATEMENT OF THE CASE

Falun Gong is an eastern form of spiritual belief and religious practice that resembles western religions in that it aims to teach people to become more compassionate and better persons. Based on the spiritual and moral principles of compassion, truthfulness and forbearance, the practice of Falun Gong flourished in China from its introduction to the public in May 1992 to the beginning of the persecution of Falun Gong in 1999.

This case concerns the persecution campaign Respondent Jiang designed, organized and carried out to eliminate the practice of Falun Gong in China. When the persecution first began in China in July 1999, many believed the campaign to be another mass movement orchestrated and backed by the Communist Party leadership as a whole. However, as plaintiffs

allege in this case, an abundance of evidence has emerged showing that Respondent Jiang not only formulated the policy of eradicating Falun Gong himself, but also, "by unleashing a Mao-style movement, Jiang forced senior cadres to pledge allegiance to hi[m]."[1] Like Saddam Hussein, the Respondent had the power to hijack government and party officials of the People's Republic of China, but not the legitimate authority.[2] As a direct result, the campaign of persecution occurred outside of the legitimate and officially mandated functions and operations of the government of the People's Republic of China and in direct violation of several provisions of the Chinese Constitution and Chinese law.

The extent and severity of the religious persecution of Falun Gong throughout China have been confirmed and extensively documented by the U.S. Government in its Country Reports on Human Rights Practices, and most especially in its Annual Reports on International Religious Freedom, as well as in reports issued by non-governmental human rights monitoring groups such as Amnesty International and Human Rights Watch. For example, the United States Department of State Country Reports on Human Rights: China (Feb. 25, 2004), states that China in 2003 perpetrated widespread abuses and violations against Falun Gong practitioners – all geared to both suppress and totally eradicate the presence of Falun Gong in China.

Noting that the Communist Party continued its crackdown against the Falun Gong spiritual group, the report enumerates just what this has meant for practitioners of Falun Gong: thousands of practitioners remained incarcerated in prisons, extra-judicial reeducation-through-labor camps, and psychiatric

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1. CNN's China expert Willy Wo-Lap Lam has reported that the persecution of Falun Gong was an attempt by Jiang to secure his own power. In the words of Lam, "the most severe criticism leveled at Jiang's handling of the Falun Gong [by insiders in China] is that he seems to be using the mass movement to promote allegiance to himself." Willy Wo-Lap Lam, "China's Suppression Carries a High Price," *CNN.com* (February 2001).

2. *See* discussion *infra,* in Section II. B. (2)

facilities. Several hundred Falun Gong adherents reportedly have died in detention due to torture, abuse, and neglect since the crackdown on Falun Gong began in 1999."[3]

Falun Gong adherents – even some who are citizens of the United States – remain in Chinese detention and re-education centers and are subjected to forms of torture equal in tragic dimension to the experience of the Jewish population during the Second World War, the Bosnians in Bosnia-Herzegovina, and the Tutsis in Rwanda. Legal redress is not possible in China. Plaintiffs have turned to U.S. courts for redress through legal channels, aware that it is their only possible avenue for relief.[4]

On October 18, 2002, the individual plaintiffs in this case filed a class action lawsuit in the United States District Court for the Northern District of Illinois against Jiang Zemin and the Falun Gong Control Office (a.k.a. Office 610). The defendants never responded to the complaint. The United States filed a "Motion to Vacate October 21, 2002 Order and Statement of Interest or . . . Suggestion of Immunity" on December 12, 2002. Thirty-nine members of Congress filed an *amicus curiae* brief on June 12, 2003, in opposition to the positions adopted by the Executive Branch in their above referenced motion and subsequent pleadings submitted in support thereof. The District Court entered its order on September 15, 2003, dismissing the case in its entirety. The District Court below held that head-of-state immunity shields former heads of state for acts of torture,

3. In a previous Country Report, the State Department specified that the bodies of many of the Falun Gong practitioners who died from torture "bore signs of severe beatings or torture, or were cremated before relatives could examine them. . . ." U.S. Dept. of State Country Reports on Human Rights Practices: China (Feb.23, 2001).

4. The Seventh Circuit concludes its decision by stating that it is not unsympathetic to the appellants' claims, but that the success of the effort to put an end to these human rights violations rests on diplomacy, not United States courts. Notwithstanding the United States' desire to end the persecution in China through diplomatic channels, six years of diplomatic overtures have in no way curtailed or even diminished the severity of the persecution.

genocide and other crimes against humanity, and that suggestions of immunity based on foreign policy concerns raised by the Executive Branch merit absolute judicial deference. Plaintiffs filed a motion for reconsideration of the same case on September 29, 2003. On October 15, 2003, the District Court entered its order denying Plaintiffs' motion for reconsideration in its entirety.

On November 15, 2003, Plaintiffs filed a Notice of Appeal with the United States Court of Appeals for the Seventh Circuit from both decisions of the District Court. The Seventh Circuit's decision was entered on September 12, 2004.

REASONS FOR GRANTING THE PETITION

It is undisputed that Respondent Jiang no longer holds the position of head of state of the People's Republic of China, and that he also surrendered his position as head of the Central Committee of the Communist Party of China.[5] Case precedent overwhelmingly supports the principle that former heads of state do not enjoy the same immunity as foreign officials presently serving in that capacity.[6] Only currently sitting heads of state are granted head-of-state immunity. The Seventh Circuit's position extending immunity to a former head of state is at odds with prevailing judicial opinion, including the views of the Second and Fourth Circuits that the head-of-state defense does not protect former heads of state permanently from civil liability, under the rationale that this type of immunity is an attribute and privilege of the sovereign state and not an individual right, and therefore expires when a head of state leaves office.[7] The Seventh Circuit's decision is also inconsistent with the underlying rationale as to why head-of-state immunity is recognized by

5. Jiang Zemin left the posts of Chair of the Communist Party and of President of China in November of 2002 and in March of 2003 respectively. *See, e.g.*, Plaintiff's Notice of Change in Defendant's Status, April 14, 2003.

6. These cases are discussed *infra* in Sections I.A, I.B.

7. *See Republic of Philippines v. Marcos*, 860 F.2d 40, 45 (2nd Cir. 1988) (citing *In re Grand Jury Proceedings*, 817 F.2d, 1108, 1111 (4th Cir. 1987)).

U.S. Courts. Immunity is accorded to heads of state as a matter of judicial comity in recognition of the mutual need not to allow courts to interfere with the proper operations of foreign governments by imposing barriers and penalties upon visiting heads of state. Once a foreign head of state has left office, that concern is substantially reduced or eliminated, and the need for applying head-of-state immunity is similarly diminished or eliminated.

In the proceedings below, neither the District Court nor the United States Court of Appeals for the Seventh Circuit took proper cognizance of the diminished applicability of head-of-state immunity once a head of state has left office. Their consideration of this case, as if it were a complaint against a sitting head of state, did not take proper account of the factual circumstance of Respondent Jiang having left office, or of the substantial legal precedents indicating that former heads of state are not accorded the same immunity and protected status as sitting chief executives.

While the District Court below recognized that former heads of state cannot be considered immune for their private acts (App. C. at 39a), neither the District Court nor the United States Court of Appeals took proper cognizance of the fact that torture and other *ultra vires* violations of *jus cogens* norms of international law are outside the scope of recognized and lawful government authority and must be considered by their nature similar to private acts. As a result, the Seventh Circuit decision is at odds with a substantial body of case law, including decisions of the Ninth and Fifth Circuits, which hold that immunity does not attach to *ultra vires* acts that go beyond what an official is authorized to do, and that therefore must be characterized as unauthorized, individual, and "not official" acts by United States courts, even if they were carried out under color of law. This is true whether the illegality is based on the domestic laws of the affected foreign nation, or on international law, and most especially when fundamental and universally recognized *jus cogens* norms of international law have been violated.

While federal courts grant an automatic deference to suggestions of immunity submitted by the Executive Branch as to the factual issue of whether or not a potential defendant currently serves as head of state, courts are not obliged to accept executive suggestions raising jurisdictional objections based on other grounds, such as act of state or potential interference with foreign policy or foreign relations concerns. In the latter circumstances courts must follow the standards established by the U.S. Supreme Court in *Sabbatino v. Banco Nacional de Cuba,* 375 U.S. 398, 401, 418 (1964), and *Baker v. Carr,* 369 U.S. 186 (1962), requiring the courts to balance foreign policy and other political considerations against other factors, notably the level of clarity and universal acceptance of the legal standards that are alleged to have been violated. The District Court and the Seventh Circuit Court of Appeals in the present case did not properly apply this standard. The circumstances of this case indicate that the exercise of jurisdiction is warranted since the potential impact on foreign relations is minimal, while the violations of international law that have been alleged, including violations of *jus cogens* standards that include some of the clearest and most universally accepted norms are of a type that courts can properly be expected to interpret and apply. Congress also has specifically recognized these norms through specific legislation (such as the Torture Victims Protection Act and the Convention Against Torture implementing statutes passed in 1994 and 1998) as justifying, and even mandating, recognition and application by U.S. Courts.

The Seventh Circuit's decision stands alone among the circuits in holding that *jus cogens* violations of former foreign officials can be considered protected and immune acts. Review is warranted to resolve the conflict among the circuits and to avoid the likelihood of future conflicts regarding the "unprotected" or "protected" status of acts such as these. Review is further warranted to ensure that the Executive Branch does not encroach upon the ability of U.S. Courts to interpret and apply firmly established standards of law.

I. FORMER HEADS OF STATE ARE NOT ENTITLED TO THE SAME IMMUNITY AS FOREIGN OFFICIALS PRESENTLY SERVING AS CHIEF EXECUTIVES OF THEIR COUNTRIES.

As reflected in almost two hundred years of legal precedent, the doctrine of head-of-state immunity provides complete protection to sitting foreign heads of state from the exercise of judicial process by U.S. Courts. However, this immunity is procedural in nature, and only attaches to the person of the head of state while he or she is in office, as it is aimed at allowing heads of state to carry out their duties efficiently and effectively without interference from the courts. Thus, in *Aristide*, the court gave special weight to the finding that the defendant could not be held subject to suit while in the exercise of his diplomatic duties and functions as the elected President of Haiti (*LaFontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994)), and that as "the chief representative of his nation, he enjoys extraterritorial status when traveling abroad." (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-139 (1812)). Or, as the British House of Lords in *Ex Parte Pinochet* stated, procedural immunity is necessary to protect the office and its functions, not the individual, and thus, while it is "attached to and protective of the office, it is lost when the individual is no longer in post." *Queen v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte)*, 1 App. Case. 147, 149 (1999).

While procedural immunity is attached to the office and its diplomatic functions and operations, and only temporarily attaches to the office holder, substantive immunity is of an entirely different nature. "Otherwise defined as residual immunity, it only protects the activities performed by state officials in the exercise of their legitimate functions."[8] Thus,

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8. *See* Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," *EJI*, p. 254 (1999). *See also* Andrea Bianchi, "Denying State Immunity to Violators of Human Rights," 46 *Austrian Journal of Public and International Law*, pp. 227-228 (1994).

while this second form of immunity continues even after the person departs from office, it offers no protection for acts that do not qualify as legitimate state functions, such as private or *ultra vires* acts that are outside the scope of official authority. Consequently, when a ruler leaves his sovereign office, he is not immune for acts of torture and other *ultra vires* violations of *jus cogens* norms that, like private acts, are unprotected and can be considered not immune as a matter of law.

A. Former Heads of State Are Not Entitled To Claim Head-of-State Immunity.

Case precedent overwhelmingly supports the principle that former heads of state do not enjoy the same immunity as foreign officials presently serving in that capacity. Numerous courts have made clear that head-of-state immunity applies only to a foreign leader or ruler *who is still in office*. In *El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82 (D.D.C. 1999), the District Court denied head-of-state immunity to three individual defendants who invoked the defense because "[n]one of the defendants is alleged to be the *sitting* official head of state of the U.A.E." (emphasis added). *See also First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (S.D. Tex. 1994) ("the Dubai defendants [as well as the estate of its former ruler] would not be entitled to head-of-state immunity, because they do not represent the state as its current ruler"); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797-98 (N.D.Cal. 1987) (head-of-state doctrine does not "encompass all government officials of a foreign state to whom the State Department chooses to extend immunity," but is limited to a sovereign or foreign minister, the "two traditional bases for a recognition or grant of head-of-state immunity"); S. Sucharitkul, *State Immunities and Trading Activities In International Law* 27-28 (1959) ("upon the cessation of their public functions sovereigns and diplomats are no longer entitled to any jurisdictional immunity"), *and see id.* at 32-34, 47-50; *Republic of Philippines,* 806 F.2d 344, 360 (2nd Cir. 1986) (failing to reach the issue directly, but noting

that the court was "not at all certain" that head-of-state immunity applied to former heads of state).

Most recently, members of this Court supported the principle of non-immunity for former heads of state. In their concurring opinions in the *Republic of Austria et al., v. Altmann*, 124 S. Ct. 2240 (2004), Justices Breyer and Souter stated that former heads of state lose immunity status once they cease to be head of state. In support, the concurrence noted that while the King of Egypt's sovereign status permitted him to ignore Christian Dior's payment demand for clothing purchased for his wife, once the king lost his royal status, he was amenable to suit (citing *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I.L.R. 228, 229 (CA Paris 1957); and citing *Ex parte Ugarte*, 1 App. Case. 147, 201-202 (1999) ("the head of state is entitled to the same immunity as the state itself . . . [but] he too loses immunity *ratione personae* on ceasing to be head of state")).

B. The Seventh Circuit's Decision Conflicts Squarely with Underlying Policies As To Why Sitting Heads of State Are Immune.

The principle of non-immunity for former heads of state is dictated by the underlying reasoning as to why head-of-state immunity is recognized by U.S. Courts, namely that comity between nations demands mutual respect for the principle that courts of one nation must not act to interfere with the proper official functioning of sister states by limiting their heads of state in the performance of their official functions and duties. *See LaFontant v. Aristide,* 844 F. Supp. at 132 (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See also* L. Henkin, *International Law* 893 (2d Ed. 1987).

However, as the courts have recognized, concerns regarding comity and the need for assuring the immunity protection for visiting heads of state no longer apply once a head of state has left office, since the potential for any interference with the functioning of foreign governments has been substantially reduced or eliminated by the change in the former head of state's

status. As an entitlement that belongs not to the individual but to the state, head-of-state immunity cannot be invoked by former leaders who no longer represent the state in an official capacity. Thus, in *Estate of Domingo v. Marcos,* 694 F. Supp. 782, 786 (W.D. Wash. 1988), the District Court declined to extend a suggestion of immunity filed by the Executive Branch beyond tenure in office because head-of-state immunity is granted on the basis of comity "to avoid the disruption of foreign relations," and once a head of state leaves office, these arguments are no longer relevant. "Head-of-state immunity serves to safeguard the relations among foreign governments and their leaders, not as the Marcoses assert, to protect former heads of state regardless of their current official status." *Id. See also Republic of Phillippines v. Marcos*, 806 F.2d 344, 360 (avoiding embarrassment to our government and showing respect for a foreign state may well be absent when the individual is no longer head of state).

Other courts, including the Second and Fourth Circuits, also have recognized that the head-of-state defense does not serve a "protective function shield[ing former heads of state] from the chilling effect of future liability," under the rationale that "immunity derives from and remains always an attribute of state sovereignty" and is not a personal right. *See Republic of Philippines v. Marcos,* 860 F.2d 40, 45 (2nd Cir. 1988); *see also In re Grand Jury Proceedings,* 817 F.2d 1108, 1111 (4th Cir. 1987).[9]

By extending head-of-state immunity to an individual who no longer embodies the sovereignty of another nation, the Seventh Circuit improperly detaches head-of-state immunity from principles of state sovereignty and transforms it into an individual right without regard for or consideration of the

9. *Cf. In re Application of Alvaro Noboa*, 1995 WL 581713 (S.D.N.Y.) ("immunity of a diplomat . . . is not a privilege of the person, but of the state he represents, [and] having divested herself of the status pursuant to which she claims the privilege, there is no reason why she should not be subject to process [*nunc pro tunc*] like other persons.")

policies upon which the doctrine of head-of-state immunity is based.

More generally, in the proceedings below, neither the District Court nor the Court of Appeals for the Seventh Circuit took proper cognizance of the difference in legal protections that apply once a head of state leaves office. Their consideration of the case as if it were a complaint against a sitting head of state did not take proper account of the factual circumstances regarding Respondent Jiang having left office, or of the substantial legal precedents indicating that former heads of state are not accorded the same immunity and protected status as sitting chief executives.

The Seventh Circuit's disregard of these principles and precedents warrants review.

II. THE SEVENTH CIRCUIT DECISION IS AT ODDS WITH THE EXPANDING BODY OF LAW THAT HOLDS THAT FORMER HEADS OF STATE ARE NOT ENTITLED TO CLAIM IMMUNITY FOR CONDUCT THAT IS *ULTRA VIRES*, BEYOND LAWFUL AUTHORITY AND IN VIOLATION OF *JUS COGENS* STANDARDS OF INTERNATIONAL LAW.

A substantial body of case law has established the principle that even though sitting foreign heads of state may be entitled to various forms of immunity from judicial process in U.S. Courts, such immunity does not attach to former foreign heads of state and officials for acts that are private and unofficial or *ultra vires* and unlawful in nature. The unprotected and "not official" nature of such actions has been characterized and explained in a variety of ways by U.S. Courts. This principle applies to actions that are deemed to be of a personal nature and therefore outside the scope of official authority. It also applies to *ultra vires* actions that go beyond what an official is authorized to do, and therefore must be considered "not official" in nature and beyond the scope of authority and of immunity claims. This is true whether the illegality is based on the domestic laws of the affected foreign nation, or is found to be contrary to

international law, and especially fundamental and universally recognized *jus cogens* norms. The alleged acts of torture and genocide by Respondent Jiang are unprotected and not immune, not only because they are domestically prohibited and in direct violation of the domestic law of China, but also, and most importantly, because they violate *jus cogens* norms embodied in numerous international treaties and in customary international law.

A. The Seventh Circuit's Decision Is At Odds with the Ninth and Fifth Circuits and Other Courts That Hold That a Former Head of State Is Not Immune for Acts of Torture and Other Abuses That Are beyond Official Authority, and Therefore Must Be Considered Illegal and *Ultra Vires*.

By affirming the District Court's extension of head-of-state immunity protections to a former head of state for his *ultra vires* acts, the Seventh Circuit's decision is at odds with the expanding body of Circuit Court opinions. These opinions hold that former leaders and officials are not immune for acts that are personal in nature, individual, unlawful, *ultra vires,* and outside the scope of official authority. Therefore, they must be treated like private unprotected acts even when carried out under color of law.

1. *Ultra Vires* Acts Are not Protected and not Immune, Similar to Private Acts.

The unprotected and non-immune status of private acts has been affirmed in many judicial decisions of the courts. In *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch), 116, 145 (1812), this Court indicated its intention to deny immunity to foreign leaders for acts that must be deemed private and unofficial in nature, holding that even a 'prince' or head of state may not be immune for his purely private conduct as he "may be considered as laying down the [mantle of the] prince, and assuming the character of a private individual," when he "acquires private property." *See also In Re Doe*, 860 F.2d 40, 45 (2nd Cir. 1988) ("there is respectable authority for denying

head-of-state immunity to a former head of state for his private or criminal acts in violation of American law"); *The Republic of the Philippines v. Marcos*, 806 F.2d 344, 360 (2nd Cir. 1986); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987).

According to Webster's Third New International Dictionary, as acts that have been perpetrated "in excess of legal power or authority (as vested in . . . an official or legislative body)," "*ultra vires*" acts are by definition "not official" acts. They are what the state or community does not authorize, or even prohibits. An act by an official is *ultra vires* if it has not been validly authorized, and is "outside the scope of his authority." *In re Estate of Ferdinand Marcos, Human Rights Litigation ("Hilao II")*, 25 F.3d 1467, 1472 (9th Cir. 1994). Thus courts have applied the *ultra vires* standard to find acts that are beyond the lawful authority of the state to be individual, non-sovereign, and therefore unprotected. In *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990), the Ninth Circuit characterizes as *ultra vires,* and therefore "non-sovereign," actions that are unprotected because they are beyond the legal authority of the state, when it states (citing *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949)): "[W]here the officer's powers are limited by statute, his actions beyond those limitations are not sovereign actions. The officer is not doing the business that the sovereign has empowered him to do." Similarly, in *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 304 (9th Cir. 1992), the court states, affirming that the defendant acted *ultra vires:* "[I]f the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the . . . state." *Cf. Ex parte Young*, 209 U.S. 123, 159 (1908) ("the use of the name of the state to enforce an unconstitutional act . . . is a proceeding without the authority of . . . the state in its sovereign or governmental capacity.").

2. The Seventh Circuit's Decision Conflicts with Other Circuits That Hold That a Former Head of State's Acts of Torture and Other Violations of Human Rights Are *Ultra Vires*, Illegal and Unprotected under U.S. Law.

The Seventh Circuit's decision is at odds with Ninth and Fifth Circuit decisions that have applied the *ultra vires* standard to acts of torture and other violations of the domestic law of the foreign state or violations of international law. These decisions find acts of torture and other violations of human rights by foreign public officials to be *ultra vires,* not official, and non-immune, like private unauthorized acts, even though they have been committed under "color of law." In *Hilao II*, 25 F.3d 1467, 1470 (9th Cir. 1994), the Ninth Circuit held that alleged acts of torture, execution and disappearances "of a dictator are not 'official acts' unreviewable by federal courts." In this case, former President Ferdinand Marcos was held to be subject to judicial scrutiny because his "individual" and *ultra vires* acts could never qualify as "official" or "sovereign" acts conferring immunity. *Id.* at 1471. "[Marcos] was not the state, but the head of state, bound by the laws that applied to him," the court declared. *Id.* (quoting *The Republic of the Philippines v. Marcos*, 862 F. 2d 1355, 1361 (9th Cir. 1988)). *See also In re Estate of Ferdinand Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) ("[defendant's] acts cannot have been taken within any official mandate and therefore cannot have been acts of . . . a foreign state").

Affirming the legality of the extradition of former head of state Marcos Perez Jiminez to Venezuela, in *Jiminez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963), the Fifth Circuit similarly held that the former head of state's financial crimes and acts of murder could not be characterized as acts of the Venezuelan sovereign but were common crimes, "done in violation of his position and not in pursuance of it." *See also Erwin v. Quintanilla*, 99 F.2d 935, 939 (5th Cir. 1938) ("immunity from jurisdiction will be

denied a foreign sovereign where . . . breach of our laws occurred.");[10] *In re Grand Jury Proceeding,* 817 F.2d 1108, 1110-11 (4th Cir. 1987) (as "an attribute of state sovereignty, [head-of-state immunity] . . . would seem to extend no further than the authorized official acts taken while the ruler is in power").

This principle is dictated by an important policy as to why immunity is not recognized for former heads of state for unofficial acts, namely that foreign policy concerns are less implicated in situations involving officials who have acted outside their official capacities. *See*, for example, *Hilao II,* 25 F.3d 1467, 1472 (9th Cir. 1994) ("[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts"). *See also*, *Xuncax v. Gramajo*, 886 F.Supp.162, 175 (D. Mass. 1995); *Shalaby v. Saudi Arabian Airlines*, 1998 WL 782021 (S.D.N.Y). As a result, a court does not risk unfavorable foreign policy implications if it takes issue with the Executive Branch's efforts to extend head-of-state immunity to a former head of state for acts that are unauthorized and "not official."

3. Former Foreign Officials' Acts of Torture and other *Ultra Vires* Acts are not Protected and not Immune just like Private, Nonimmune Acts.

Many other U.S. cases have applied the *ultra vires* rationale with respect to violations of international law and/or relevant U.S. or foreign domestic law to find acts of torture and other human rights violations by former public officials to be *ultra vires* and not immune, similar to private, nonimmune acts.[11] *See*, for example, *Letelier v. Republic of Chile*, 488 F. Supp.

10. *See also United States v. Noriega,* 746 F. Supp. 1506, 1521 (S.D.Fla. 1990) where the court declined to dismiss the case against the former leader of Panama under the act of state doctrine for violations of the domestic law of Panama, because the inquiry is whether or not his "activities are 'acts of state,' i.e., that they were taken on behalf of the state and . . . not on behalf of the actor himself."

11. *See Schooner v. McFaddon,* 11 U.S.at 144, and analysis *supra* in II. A. 1.

665, 673 (D.D.C. 1980) ("[t]here is no discretion to commit, or to have one's officers or agents commit, an illegal act . . . no 'discretion' to perpetuate conduct designed to result in an . . . assassination . . . action that is clearly contrary to the precepts of humanity as recognized in both national and international law."); *Xuncax v. Gramajo,* 886 F. Supp. 162, 176 (D.Mass. 1995) (where the court denied immunity to Hector Gramajo, the former Guatemalan Minister of Defense, for his acts of summary execution and disappearances because "the acts which form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority," and the court also stated that "[t]here is no suggestion that either the past or present governments of Guatemala characterize the actions alleged here as 'officially' authorized"); *Paul v. Avril*, 812 F. Supp. 207, 211–212 (S.D. Fla. 1993) (the court denied immunity to Prosper Avril, the former head of the Haitian military, for human rights violations because "the acts as alleged in the complaint, if true, would hardly qualify as official public acts"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197-98 (S.D.N.Y. 1996) ("the alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority. . . . [t]herefore, he is not shielded from Cabiri's claims"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987) (holding that acts of torture, extra-judicial execution and arbitrary detention by a former member of the junta conducting Argentina's "dirty war," although somewhat "official," were not governmental, "public" or "public official" acts nor "ratified," but were "illegal" acts).

The United States Senate also has recognized that the justification for an immunity claim disappears in cases filed under the Torture Victim Protection Act, 28 U.S.C. § 1350 ("TVPA"), authorizing courts to adjudicate alleged acts of torture, when the foreign official in question leaves office.[12]

12. The TVPA provides that an individual who "under actual or apparent" authority, or color of law, subjects an individual to torture shall be liable for damages to that individual. *See* 28 U.S.C. § 1350.

For example, during the passage of the TVPA, the Senate Judiciary Committee stated that:

> the Committee does not intend [head-of-state or other immunity claims based on official status] to provide former officials with a defense to a lawsuit brought under this legislation. . . . [T]he FSIA should not normally provide a defense to an action taken under the TVPA against a former official. . . . [T]he committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for former officials.

S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991).

> Moreover, the Senate Committee report notes:
> since [the act of state] doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 249, 102d Cong., 1st Sess., at note 15.

Even the Executive Branch has acknowledged that the justification for immunity in cases brought under the TVPA (one of the grounds of this case) disappears when the foreign official leaves office. *See Doe v. Qi*, 2004 WL 2901626 (N.D. Cal. 2004).

In a letter dated September 25, 2002, from William H. Taft, IV, Legal Advisor, U.S. Department of State, to Robert D. McCallum, Jr., Assistant Attorney General, the State Department:

> acknowledge[d] the expanding body of judicial decisions under the TVPA holding *former* foreign government officials liable for acts of torture and extrajudicial killing despite (or indeed because of) the fact that the defendants abused their governmental positions. . . . [and that the TVPA provides an] explicit statutory basis for suits against former officials . . . for acts of torture and extrajudicial killing committed in an official capacity.

The Seventh Circuit's expansion of the head-of-state immunity doctrine to former heads of state for acts that cannot

be characterized as "official" acts or "legitimate state functions," is at odds with several Circuit Court holdings and presents a substantial issue for review.

B. The Seventh Circuit Conflicts with Other Circuits in Holding That a Foreign Official's Violations of *Jus Cogens* Norms Are Protected Immune Acts.

Violations of *jus cogens* norms of international law must also be considered outside of immunity protections. Even in our nation's early history, former heads of state were not deemed immune for acts in violation of customary norms of international law and firmly established *jus cogens* norms. Thus, in *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), the Supreme Court held that although a public vessel of a foreign sovereign was ordinarily entitled to immunity from libel proceedings in American courts, immunity could not be invoked if the vessel had violated the laws of neutrality under the "law of nations." *Id.* at 353. The Court directly analogized that situation to the immunity of a foreign sovereign or head of state:

> [A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions. . . . If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of his nation.

Id.[13]

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13. Justice Story's opinion for the Court reflects the clear rule of customary international law summarized in Vattel's treatise: that a foreign ambassador should be given immunity "unless he violates the law of nations by some enormous crime." Emmerich De Vattel, *The Law of Nations* ch. 2, § 34 (1758). Vattel's *Law of Nations* was the authoritative treatise on international law; it had equivalent stature to Blackstone's *Commentaries*, and could be found in the libraries of most of the framers of the Constitution. In the 19th Century, Vattel was the most cited author on international law in the opinions of the Supreme Court.

The analogy is precise. The ship can be attached if it violated norms of customary international law, in this instance the international prohibition against acts taken in violation of the law of neutrality. Similarly, a head of state can be personally subjected to American jurisdiction if he violates norms of customary international law, and firmly established *jus cogens* norms.[14]

1. Violations of Torture and Other *Jus Cogens* Norms Perpetrated by Foreign Officials Are Not Legitimate State Functions and Are Not Protected and Not Immune.

Plaintiffs' complaint is based upon allegations that constitute behavior manifestly in violation of the most basic rules of customary international law, and indeed of civilized conduct. Plaintiffs seek redress not merely for acts that are *ultra vires,* but more particularly, for violations of *jus cogens* norms, including but not limited to the crimes of genocide and torture. *See* RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT THIRD] § 702, cmt. n (1987), stating that acts of genocide, slavery and extrajudicial killing violate *jus cogens* norms. *See also Siderman de Blake v. Republic of Argentina* [hereinafter *Siderman*], 965 F.2d 699, 717 (9th Cir. 1992) (the prohibition against torture "carries with it the force of a *jus cogens* norm," which enjoys the "highest status within international law").

Jus cogens violations are qualitatively different from other *ultra vires* acts. As defined in the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention], May 23, 1969,

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14. *Accord The Appam*, 243 U.S. 124 (1917) (sovereign immunity of a public ship does not extend to such prize and property captured in violation of the forum's neutrality). *See also* E. De Vattel, *The Law of Nations*, ch. 4, § 54 (1758), insofar as it extends the unprotected sphere of head of state activity to include acts of murder, presumably as violations of the domestic law of the foreign state ("[t]he Prince who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer considered in any other light than that of an unjust and outrageous enemy").

1155 U.N.T.S. 332, 8 I.L.M. 679, a *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, art. 53 (cited in *Siderman, id.* at 714-719). The RESTATEMENT THIRD, *supra*, § 102 comment (d) adopts the Vienna Convention's definition of *jus cogens* norms as binding on all nations and "derived from values taken to be fundamental by the international community rather than from the ... choices of nations."[15]

The underlying justification for revoking immunity for officials who violate *jus cogens* norms of international law is that a sovereign state cannot defend these acts as official, legitimate functions of the state. Thus, in *The Presbyterian Church of Sudan v. Talisman Energy Inc. and the Republic of Sudan*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), the District Court held that all states may exercise a universal jurisdiction over acts committed in violation of *jus cogens* norms because these violations are fundamentally different from other international law violations by virtue of the "depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce." (citing *Tachonia v. Mugabe*, 234 F. Supp. 2d 401, 415-16 (S.D.N.Y. 2002).[16]

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15. As the International Court of Justice notes, violations of these norms constitute violations of obligations owed to all ("obligations *erga omnes*"). *The Barcelona Traction, Light & Power Co. ("Belgium v. Spain")* 1970 I.C. J. 3, 32; also see, RESTATEMENT THIRD, *supra*, § 702, cmt. o. *See also id.* § 404.

16. The same rationale explains the British House of Lord's decision, 6-1, that ex-Chilean President Pinochet's acts of torture are not amenable within the functions of a head of state. *See Ex parte Pinochet Ugarte*, 1 App. Case. 147, 165(d) (1999) (although the alleged

(Cont'd)

2. Respondent Jiang's Alleged Crimes Rise to the Level of *Ultra Vires* Acts that Violate Domestic Chinese Law and *Jus Cogens* International Standards.

The Respondent's acts of torture, genocide and the other abuses detailed by Plaintiffs in their complaint not only violate the domestic law of the People's Republic of China, but also violate *jus cogens* standards of international law. The Government of China itself has disclaimed publicly the alleged violations in documents submitted *ex parte* to a federal court in the related case of *Doe v. Qi*, 2004 WL 2901626 (N.D. Cal. 2004).[17] The Chinese Government's clear written assurance to a U.S. Court that any human rights abuses resulting from the campaign of persecution against Falun Gong are unlawful and unauthorized under their system, and violate provisions of Chinese law, provides a clear basis for finding that the Respondent operated outside and beyond the legitimate scope of his authority, and that his acts of torture and genocide violate *jus cogens* standards of international law.

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acts of torture were carried out by General Pinochet "under colour of his position as head of state . . . they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime").

17. In *Doe v. Qi*, the District Court of Northern California said,

> [w]here, as here, the People's Republic of China appears to have . . . publicly disclaimed the alleged human rights violations caused or permitted by Defendants . . . and asserts that such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under a valid grant of authority. . . . The authorities presented by Plaintiffs establish that the alleged conduct for which the Defendants are responsible was inconsistent with Chinese law. Accordingly . . . sovereign immunity thereunder does not lie.

Id. at 29.

The Seventh Circuit's decision stands alone among the circuit decisions in holding that acts of torture and other *jus cogens* violations of a former head of state or foreign official can be considered protected and immune acts. The decision is unprecedented. Left undisturbed, it will undermine the legislative intent of Congress in its passage of the TVPA. Review is further warranted to resolve the conflict among the circuit courts and to avoid the likelihood of future conflicts concerning the "unprotected" or "protected" status of acts such as these.

C. Respondent Jiang Is Not Eligible To Claim FSIA Immunity Protection.

The Respondent cannot claim foreign sovereign immunity protections as a basis for seeking to shield his actions from judicial process in the United States.

1. The FSIA Provisions Do Not Govern the Acts of Foreign Officials That are beyond the Scope of their Official Authority.

The Seventh Circuit decision acknowledges that acts of torture and genocide qualify as violations of *jus cogens* norms, and that *jus cogens* norms are "norms from which no derogation is permissible." (App. A. at 13a). However, the opinion cites its holding in *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149-50 (7th Cir. 2001), as "instructive" to suggest that foreign sovereign immunity considerations under the FSIA attach automatically to heads of state because heads of state are indistinguishable from the foreign sovereign, in total disregard of the fact that the FSIA provisions govern only foreign nations and their instrumentalities.

It is critical to understand that the suit in *Sampson v. Federal Republic of Germany*, and the analogous circuit court cases cited by the Seventh Circuit for the same proposition, were not filed against the individual officials responsible for the *jus cogens* violations, but against the government itself.[18] The provisions

18. *See* App. A at 13a, where the Seventh Circuit cites *Smith v.* (Cont'd)

of the FSIA that grant immunity to foreign governments do not automatically attach to a suit against a foreign official. In this case, the challenged acts of torture, genocide, and crimes against humanity are not only violations of *jus cogens* norms, they are beyond the scope of Respondent Jiang's authority as head of state, and therefore constitute *ultra vires* conduct. This is the precise distinction drawn by the Ninth Circuit in *Hilao II*, 25 F.3d at 1471-72, to explain its departure from its holding in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992):

> *Siderman* does not dictate a different result. . . . *Siderman* was an action against the Republic of Argentina. . . . In this case, the action is against the estate of an individual official who is accused of engaging in activities beyond the scope of his authority . . . acts of torture, execution and disappearance . . . not taken within any official mandate, and therefore not the acts of a . . . foreign state.

The Ninth Circuit carefully characterized the former leader's *jus cogens* violations as conduct "beyond the scope of his authority." This clearly underscores the difference between cases in which the sovereign state is sued directly, as for example, *Siderman de Blake v. Republic of Argentina*, and a lawsuit against a foreign official for his *ultra vires* actions. Even if the official, lawfully exercised acts of a foreign official could be characterized as covered by FSIA protections, such immunity would not apply to actions taken outside the scope of his authority.

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Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany*, 26 F.2d 1166, 1173 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

2. All the Cases the Seventh Circuit Decision Cites in Support of the Applicability of Foreign Immunity Preceded the Passage of the FSIA and are therefore not Relevant or Controlling.

The cases cited by the Seventh Circuit in support of claims for deference based on FSIA grounds are not relevant because they were decided before the passage of the FSIA and the FSIA statute has changed the way courts now handle these matters. Moreover, as the FSIA was designed to curtail the Executive's role in sovereign immunity decisions to "free the government from the case-by-case diplomatic pressures [placed upon it by foreign governments seeking to have their case dismissed through diplomatic and political channels] . . . and to assure litigants that . . . decisions are made on purely legal grounds and under procedures that ensure due process," the FSIA itself speaks against an expansion of the suggestion of immunity procedure, most notably in a case where the Executive has been subject to the very same political pressures to have the case dismissed through diplomatic channels rather than decided on legal grounds under "procedures that ensure due process." *See Verlinden V.B. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).[19]

III. SUGGESTIONS OF IMMUNITY ARE CONSIDERED BINDING ONLY WHEN THEY DEAL WITH FACTUAL DETERMINATIONS REGARDING THE HEAD-OF-STATE STATUS OF SITTING FOREIGN OFFICIALS.

While federal courts grant considerable deference to suggestions of immunity submitted by the Executive Branch as to the factual issue of whether or not potential defendants currently serve foreign nations as heads of state, automatic deference is not granted for executive submissions raising

19. *See generally*, P. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale Stud. in World Pub.Ord. 1, 34-36 (1976) (discussing the impact of political factors on State Department immunity determinations).

jurisdictional objections based on other grounds such as foreign sovereign immunity, act of state, or potential interference with foreign policy or foreign relations concerns. In the latter circumstance, courts are obliged to follow the standards established by the U.S. Supreme Court in *Baker v. Carr,* 369 U.S. 186 (1962) and *Banco Nacional de Cuba v. Sabbatino,* 375 U.S. 398, 401, 418 (1964) requiring the courts to balance foreign policy impacts against other factors including the level of clarity and universal acceptance of the international legal standards that are alleged to have been violated. The District Court and the Seventh Circuit Court of Appeals in the present case did not properly apply this standard.

Under the circumstances alleged in the case at bar, the *Baker* and *Sabbatino* standards suggest that the exercise of jurisdiction is warranted since the potential impact on foreign relations is minimal, while the violations of international law that have been alleged (including torture and genocide) are among the clearest and most universally recognized, and therefore are of a type that courts can properly be expected to interpret and apply. They also have been specifically recognized by the U.S. Congress through legislation justifying, and even mandating, recognition and application by U.S. Courts.

A. An Automatic Deference Is Conferred When The Executive Branch Submits a Suggestion of Immunity Indicating That a Current Defendant Holds Head-of-State Status.

A central principle of the Seventh Circuit decision – that the enactment of the FSIA did not alter the binding affect of suggestions of immunity filed by the Executive Branch on behalf of foreign heads of state – is consistently reflected in many post-FSIA cases where the government has filed suggestion letters on behalf of **current** heads of state. In *LaFontant v. Aristide*, 844 F. Supp. at 133, the district court dismissed the case against the current leader of Haiti pursuant to a suggestion of immunity filed by the Executive Branch because a "head of state recognized by the United States government is absolutely

immune from the jurisdiction of United States courts." The court clarified its holding by indicating that recognition of a defendant head of state is the "exclusive function of the Executive Branch," and that "it is not a factual issue to be determined by the courts." *Id.* Similarly, in considering Karadzic's claim of head-of-state immunity in *Does v. Karadzic*, 866 F. Supp. 734, 737-38, (S.D.N.Y. 1996), the district court stated (quoting *Republic of Philippines v. Marcos*, 860 F.2d 40, 44-46 (2nd Cir. 1988)): "Were the Executive Branch to declare the defendant a head of state, this court would be stripped of jurisdiction." *See also*, *Flatow v. Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998) ("[o]nly individuals whom the United States recognizes as legitimate heads of state qualify; whether an individual qualifies as a head of state is a decision committed exclusively to the political branches and the judiciary is bound by their determinations") (citing *Sabbatino*, 376 U.S. at 410). *See also*, *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (claim naming British Prime Minister Thatcher in an action for damages dismissed on the basis of the Government's suggestion of immunity for a sitting head of government); and *Tachonia v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), citing *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D.Tex. 1994) (dismissing a claim against King Fahd on the appearance by the United States to acknowledge that King Fahd was the recognized and current head of state of Saudi Arabia, which representation the court accepted as conclusive).

B. Executive Suggestions of Immunity That Do More Than Certify an Official's Current Status by Raising Foreign Policy or Political Concerns Are Subject To Judicial Scrutiny.

Executive suggestions that do more than certify a defendant's status as a head of state by raising other jurisdictional objections based on grounds such as act of state, or potential interference with foreign policy and foreign policy concerns do not merit absolute judicial deference. While the Seventh Circuit takes the position that judicial deference is required for all

suggestions of immunity, case precedents indicate the opposite. Where matters other than present head-of-state status are at issue, courts are instead obliged to balance foreign policy impacts against the level of clarity and universal acceptance of the international legal standards that are alleged to have been violated.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 425, Justice Harlan, writing for an 8-1 majority, concluded that the "proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs ... in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." Far from denying the role of the federal courts in the interpretation of cases under international law, Justice Harlan encouraged the judicial branch to 'say what the law is' when there is a "greater degree of codification or consensus concerning a particular area of international law ... since the courts can focus on the application of an agreed principle to circumstances of fact." *Id.* at 428. Similarly, in *Baker v. Carr,* 369 U.S. at 211, rejecting its sweeping statement in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), the Supreme Court made it clear that *not all questions involving political matters* are beyond the purview of the courts. The Court explained that the political question doctrine is "one of 'political questions,' not one of 'political cases.'"

This approach reflects the basic constitutional principles that call for a shared responsibility among the three branches of government when the interpretation and application of international law are involved.[20] More generally, this approach

20. International law is one of those areas where the coordinate branches have always exercised a partial agency in the acts of the others. While the Constitution authorized Congress to "to define and punish ... Offenses against the "Law of Nations," congress' authority to construe the law of nations was never exclusive. The courts have spent much of their time deciding cases that arise under the law of nations, and more generally deciding cases that affect foreign affairs and international law. The importance of judicial scrutiny in this area is (Cont'd)

is required by the principles of separation of powers – the "blend of powers" that assures that no branch undermine the authority and proper role of the others.[21] An application of the *Sabbatino* and *Baker* standards indicates that the violations of international law alleged in this case are of a type that fall within the proper role and authority of the courts. The basis for adjudication in this case rests not only on the clear congressional mandates and judicially enforceable provisions of the TVPA, but also on the clear and universally accepted standards regarding the prohibitions against torture and genocide embodied in a wide variety of ratified treaties, and in Congressional statutes implementing these standards, as well as firmly established customary international law. Congress has provided a clear mandate in the Torture Victim Protection Act authorizing U.S. courts to deal with these issues. In *Sosa v. Alvarez-Machain*, 542 U.S. __ (2004), this Court expressed its support for the adjudication of violations of the "law of nations" under the

(Cont'd)

especially well reflected in not only the *Sabbatino* and *Baker* balancing tests but the many court cases that in their application of these principles have made clear that judicial review cannot be foreclosed merely because there may be potential impact on foreign policy concerns.

21. Thus as James Madison states in *The Federalist Papers,* separation of powers does "not mean that these departments ought not to have partial agency in or control over the acts of each other." *See, Federalist*, *No. 47,* at 314-315 (James Madison) (Edward Mead Earle ed., 1941). Accordingly, the Court has "not hesitated to strike down provisions of law that . . . accrete to a single branch powers more appropriately diffused among separate branches." *See Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1876)). More generally, on this point, see Paul Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 265 (1990):

> [I]t is naive – as well as undesirable – to think of separation of powers rules as capable of creating sealed chambers each of which must contain all there is of the executive, legislative, and judicial powers. Overlap is inevitable. . . . And that is why . . . no branch truly has exclusive jurisdiction even within its own domain.

ATCA based on international norms of as "definite content and acceptance among civilized nations as the historical paradigms familiar when section 1350 [of the ATCA] was first enacted."[22] Torture and genocide meet this standard, and this Court recognized this when it cited the TVPA as a legitimate basis for tort claims against foreign officials. *Id.*

The U.S. Department of State has acknowledged that these violations and abuses have taken place and has publicly condemned them.[23] Consequently, adjudication of the case at bar is warranted not only because it falls within the proper role of the courts to interpret and apply the law, but also because the foreign policy impact is minimal and adjudication is appropriate and would not abridge the authority or proper role of the Executive Branch.

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22. This Court held these crimes to be of such gravity and weight as to find it "neither suitable or appropriate to weigh the proposed standard against potential or foreign policy consequences. *Sosa Alvarez-Machain*, No. 03-339, slip-op. at 38.

23. As indicated *supra* in Section I. B, the Circuit Courts have virtually all indicated that avoidance of embarrassment of the Executive in carrying out foreign policy does not carry much weight when the individual no longer acts in his or her official capacities. More generally, the United States Department of State has taken the position that enforcing customary human rights norms under the ATCA does not contravene U.S. foreign policy. In *Filartiga*, the first human rights case under the ATCA, the State Department submitted an amicus brief in support of plaintiffs. *See Memorandum for the United States as Amicus Curiae*, 19 I.L.M. 585 (May 1980), where the State Department confirms that when an international consensus exists about a right, "there is little danger that judicial enforcement will impair our foreign policy." *Id.* at 604. Although acknowledging that such cases may implicate foreign policy considerations, the brief concludes: "the protection of fundamental human rights is not committed exclusively to the political branches of government." The Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), agreed with the State Department, and specifically rejected the argument that judicial resolution of ATCA suits is barred by the political question doctrine. *See Memorandum for the United States in Filartiga v. Pena-Irala, reprinted in* 12 Hastings Int'l & Comp. L. Rev. 34 (1988).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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